INDEX.

ACCOUNT.

1. When an account between parties is stated, with debit and credit sides, and the very matter about which the controversy arises is stated in the account, the presumption of law is, that the account is just, unless it be shown that there is some fraud, omission or mistake. *Carroll* v. *Paul*, 226.
2. One tenant in common may sue another under the new code, without resorting to the action of account under the statute of 1845. *Rogers* v. *Penniston*, 432.

ACTION ON THE CASE.

1. A. sets fire to the stubble on his inclosure, and, without any negligence or default on his part, and by inevitable accident, it escapes and crosses over the open prairie to the inclosure of B. and burns his fence. *Held*, A. is not liable to an action for the damage.
2. *Query*, If the stubble is fired on Sunday? *Miller* v. *Martin*, 508.

ADMINISTRATION.

See JUDGMENTS, 2.

1. The third and fifteenth sections of the act concerning executors and administrators, approved February 21, 1825, have no retrospective operation and do not have the effect to revoke the letters of an administratrix who had married before the passage of the act. *Frye* v. *Kimball*, 9.
2. In an action by a child against the administrator of his deceased mother, for money received by her in the capacity of guardian, the administrator will not be allowed to set up a claim for the support and education of the child by the intestate, when there is no evidence that she ever intended to make a charge therefor. *Guion* v. *Guion's Administrator*, 48.
3. Executions against the estates of deceased persons, were legal in this state, until the passage of the act approved December 30, 1826, which took effect from May 1, 1827. *Carson* v. *Walker*, 68.
4. Under the act of January 25, 1817, section 5, taken in connection with the act of January 12, 1822, section 28, where an execution against the estate of a deceased person was issued in less than eighteen months after the date of the letters testamentary, but the sale of the lands under it did not take place until more than eighteen months had elapsed, the sale is valid. *Ibid.*
5. Under the statute of this state up to 1826, land, which the testator had devised in trust for an infant child, might be levied on and sold under an execution against the estate of the testator. *Ibid.*
6. An administrator cannot impeach the conveyance of his intestate for fraud as to creditors. *McLaughlin* v. *McLaughlin*, 242.
7. After an administrator, upon a settlement, has been adjudged to pay over a sum of money, he is subject to garnishment in a suit against the person in whose favor payment has been adjudged. *Richards* v. *Griggs*, 416.
8. Under sections 9, 10 and 11 of article 2 of the act concerning administration, (R. S. 1845,) a creditor of an estate cannot maintain an action in the county court against

ADMINISTRATION—(*Continued.*)

the administrator for concealing or embezzling property of the estate. *Powers* v. *Blakey's Administrators*, 437.

9. Although the county court has exclusive original jurisdiction of controversies respecting the duties of administrators, yet that jurisdiction can only be exercised in the manner prescribed by statute. *Ibid.*

10. To give the county court jurisdiction of a proceeding by a creditor against an administrator, for waste, under sections 1, 2, 3 and 4 of article 7 of the act concerning administration, (R. S. 1845,) it must appear that there is an insufficiency of assets returned by the administrator to pay all demands allowed against the estate. *Ibid.*

11. In a proceeding before a county court by an administrator, to obtain an order for the sale of real estate claimed as belonging to the estate of his intestate, a party cannot interfere and resist the order of sale, on the ground that he has a superior title. Such a person is not "interested in the estate," within the meaning of the 24th section of article 3 of the act concerning administration, (R. S. 1845.) *Shields* v. *Ashley's Administrator*, 471.

12. County courts have no jurisdiction to try titles to land. *Ibid.*

See ASSUMPSIT, 1.

AGREEMENTS.

See CONTRACTS.

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See PLEADING, 2. SUPREME COURT, 2.

APPEAL.

1. An appeal does not lie from the St. Louis law commissioner's court to the circuit court, but only to the supreme court. *Little* v. *Sellick*, 269.

2. The St. Louis law commissioner cannot affirm the judgment of a justice of the peace, for the non-payment of the fee given him by the act of February 17, 1851, upon the filing of the appeal papers. *Hunt* v. *Hernandez*, 170.

3. A circuit court has no right to dismiss an appeal from a justice, on account of the smallness of the amount in controversy. *Harris* v. *Hughes*, 599.

ASSAULTS.

See CRIMES AND PUNISHMENTS, 1.

ASSIGNMENT.

See ASSUMPSIT.

1. The assignee of a lease by way of mortgage is not liable to the lessor for rent, unless he enters into possession. *McKee* v. *Angelrodt*, 283.

2. To constitute a valid assignment of a debt not evidenced by bond, bill or note, as against the debtor, notice must be given to him; and if, after an assignment without notice to him, judgment is obtained against him, as garnishee, in a suit against his original creditor, he will be protected. *Richards* v. *Griggs*, 416.

3. Where a debtor, in failing circumstances, assigns all his property for the benefit of certain preferred creditors, a clause in the deed of assignment, directing the surplus, if any, after paying the enumerated debts, to be paid the grantor, will not make the deed fraudulent as to the other creditors, where it is admitted that the whole property is insufficient to pay even the preferred debts. *Richards & Robinson* v. *Levin*, 596.

ASSUMPSIT.

See PLEADING, 3.

ASSUMPSIT—*(Continued.)*

1. A. assigns to B. money due him from the United States as pay for services in the war of the revolution. A. dies, and C., his administrator, receives the money from the government. *Held*, B. cannot maintain an action against C. for the money without having first made a demand. *Evans* v. *King*, 525.

ATTACHMENT.

See INTERPLEADER. BONDS AND NOTES.

AUTHENTICATION.

See RECORDS, 1.

BAILMENT.

See COMMON CARRIERS.

1. The delivery of a slave, on a bailment by way of loan, does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. *McDermott* v. *Barnum & Moreland*, 114.

BILLS OF INTERPLEADER.

See *Richards* v. *Griggs*, 416.

BOATS AND VESSELS.

1. Under the 35th section of the act concerning boats and vessels, (R. S. 1845,) one of several part owners of a boat may sue in the name of the boat. *Steamboat Beardstown* v. *Goodrich & Osborne*, 153.
2. See COMMON CARRIERS.
3. On an open running account against a boat, the lien continues for six months from the date of the last item. *Carson & Brookes* v. *Steamboat Dan. Hillman*, 256.
4. Under the fourth subdivision of the first section of the act concerning boats and vessels, (R. S. 1845,) an action cannot be maintained against a boat, for damages sustained by a hand, in being forced ashore by the master, in breach of a contract of hiring. *Blass* v. *Steamboat Robert Campbell*, 266.
5. See JUDGMENTS, 2.

BONDS AND NOTES.

A., commencing an attachment suit against B., in the United States circuit court, executed a bond to B., conditioned to pay all damages that might accrue to B. or to any garnishee, by reason of a failure to prosecute the suit, with effect and without delay. *Held*,

1. In case of a breach of the bond, B. may maintain a suit thereon to the use of any garnishee who has been damaged.
2. Such a bond, although voluntary and not authorized by any statute, is good as a common law bond.
3. A bond with the same condition, made to the United States, instead of B., is valid, although not executed in pursuance of any law, nor in connection with any business of the United States, nor any duty of the obligor to them. A garnishee may sue on such a bond, in the name of the United States, to his use. *Barnes* v. *Webster*, 258.

See GARNISHMENT, 5. JUDGMENTS, 2. MORTGAGE, 6.

BOUNDARIES.

1. A deed, which refers for a description of the land conveyed, to a plat which shows a river to be one of the boundaries, is to be construed as if such a call was expressed in the body of the instrument. *Shelton & Heatherly* v. *Maupin*, 124.
2. When a deed, made either by the government or an individual, calls for a river as a boundary, the tract must have that boundary, although it does not correspond with the established corners and monuments. *Ibid.*

BOUNDARIES—*(Continued.)*

3. Where the owners of contiguous lots mutually establish a boundary line, and build up to it, and use and occupy according to it, for a period long enough to show their acquiescence, although less than the period which would be a bar under the statute of limitations, they and those claiming under them will be estopped from afterwards claiming a different boundary. *Blair* v. *Smith*, 273.

CHANCERY.

1. The St. Louis court of common pleas, under the new code, has chancery jurisdiction. *McLaughlin* v. *McLaughlin*, 242.
2. See PLEADING, 6. PRACTICE, 6, 7, 8, 17. SUPREME COURT.
3. A mistake in the calculation of interest will be relieved against by a court of equity. *Boon* v. *Miller's Executors*, 457.

CIVIL LAW.

See *Childress & Mullanphy* v. *Cutter*, 24.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In a proceeding under the new code, to recover personal property, the value of the property need not be stated in the petition, if it is stated in the affidavit; nor is the omission of the jury to find the value a fatal error. *Schaffer* v. *Faldwesch*, 337.

COMMON CARRIERS.

1. Although a steamboat may be liable as a common carrier, for packages of money, yet there can be no such liability, if the service was to have been performed without hire. *Chouteau & Valle* v. *Steamboat St. Anthony*, 216.
2. The act of a captain of a boat, in taking money for transportation, is not *prima facie* evidence of the liability of the boat. *Ibid.*
3. To make the boat, or its owners liable, in such a case, it must be shown that it was within the scope of the usual employment and services of the boat, for the captain to carry packages of money for hire on account of the owners. If the captain carries them on his own account and responsibility, the owners are not liable. *Ibid.*
4. The law which controls the liability of common carriers does not begin to apply until the actual bailment is made. The act of God will not excuse a man for failure to comply with an absolute contract to receive and transport goods at a future time, merely because he is a common carrier. *Collier* v. *Swinney*, 484.

COMMUNITY.

1. By the custom of Paris, real estate owned by either party, at the time of marriage, did not enter into the community. *Childress & Mullanphy* v. *Cutter*, 24.
2. A marriage contract, purporting to create a community according to the custom of Paris, contained this clause: "The said future spouses take each other, with their property and all the rights now actually belonging to them, and also those which may fall to or appertain to them, &c., which property shall wholly enter into the community, &c." *Held*, the words "which property," must be understood as applicable only to that which came to them during marriage. *Ibid.*

COMPROMISE.

See ESTOPPEL, 7.

CONFIRMATIONS.

See LANDS AND LAND TITLES.

CONSIDERATION.

See CONTRACTS, 4.

CONSTITUTION.

1. The third and fifteenth sections of the act concerning executors and administrators, approved February 21, 1825, have no retrospective operation. *Frye* v. *Kimball*, 9.
2. The legislature has power to change the terms of courts and the return days of suits and process. *Carson* v. *Walker*, 68.
3. The act concerning "towns," (R. S. 1845,) is constitutional. The duties imposed on the county court are judicial and not legislative in their nature. *Kayser* v. *Bremen*, 88.

CONTRACTS.

A. conveyed to B. real estate to be held in trust for A. until a certain sum was paid, and afterwards in trust for the separate use of the wife of C. At the same time, A. executed an agreement to complete improvements then in progress on the property, in a specified time and manner. *Held*,

1. Although C.'s wife assumed no personal obligation to pay the stipulated price, yet payment could be enforced against the property itself. *Soulard* v. *Lane*, 366.
2. She is entitled to a deduction from this sum, to the extent of any loss sustained by a failure of A. to comply with his contract to complete the improvements. *Ibid.*
3. The rule which would prevent A. from recovering any part of the price, unless he had strictly complied with his contract, is only applicable where a defendant is resisting a personal judgment, because of a failure of plaintiff to have work done according to a contract. *Ibid.*
4. A. sold B. certain slaves, warranting his title to be good. *Held*, as long as B. remains in undisturbed possession of the slaves, he cannot set up, as a defence to a note given for the purchase money, that, at the time of the sale, the title was not in A. In such a case, there is no failure of consideration, within the meaning of the fourteenth section of article five of the act concerning "justices' courts," (R. S. 1845.) *Morrison* v. *Edgar*, 411.
5. A. and B. own a ferry in common, with an agreement that each shall be entitled to one half of the proceeds, after paying all expenses. B., in good faith and for a valuable consideration, leases the ferry out to C. without the consent of A. *Held*, A. cannot recover of B. one-half of the proceeds received by C., but only one-half of the rent reserved by B. *Rogers* v. *Penniston*, 432.
6. See *Pitcher* v. *Hovey*, 436.
7. Where A. contracts to do work under the control and direction of B., he is not responsible for want of skill, unless he fails to comply with B.'s directions. *Denny* v. *Kile*, 450.
8. A party can maintain no action on a contract which he procures by fraud. *Ibid.*
9. By the terms of a contract sued on, the defendants were to deliver plaintiff broom corn, cleaned and baled, ready for shipping, as fast as the same could be prepared by them; the plaintiff was to have the control and direction of the whole work. *Held*, evidence of defects in machinery furnished by plaintiff to defendants, which occasioned delay, is competent evidence for defendants, in an action for a breach of the contract. *Ibid.*
10. A plaintiff cannot recover for the breach of a stipulation in a contract, unless he has performed all the acts on his part, which were conditions precedent, and is ready to perform those which were to be performed concurrently with the act of the defendant. *Ibid.*
11. The facts appearing in evidence, the understanding of a witness can have no influence in determining whether one or two persons are bound by a contract. *Elliott* v. *Sanderson*, 482.

CONTRACTS—*(Continued.)*

12. The act of God will not excuse a man for failure to comply with an absolute contract to receive and transport goods at a future time, merely because he is a common carrier. *Collier* v. *Swinney*, 484.

CONTRIBUTION.

1. A., owning several tracts of land subject to the lien of judgments in the county, executes a bond to convey one of them to B., by deed of general warranty. Before B. records his title, an execution from another county is placed in the hands of the sheriff, which is levied on the other tracts owned by A., and they are sold, and C. becomes the purchaser. Afterwards, and before B. pays the purchase money, executions upon the judgments first named are levied on the tract sold to B., and it is sold, B. buying it in. *Held*, B. cannot maintain an action against C. for contribution. If C. is liable to any one in such an action, it is to A. *Ingram & Hathaway* v. *Tompkins*, 399.

CONVEYANCES.

1. Although a survey of the United States within a confirmed claim is of no force against the claimant, yet, when he adopts the survey, as designating any portion of his land, it may furnish a valid description, by which he may convey such portion. *Shelton & Heatherly* v. *Maupin*, 124.
2. A deed which refers for a description of the land conveyed, to a plat which shows a river to be one of the boundaries, is to be construed as if such a call was expressed in words in the body of the instrument. *Ibid.*
3. When a deed, made either by the government or an individual, calls for a river as a boundary, the tract must have that boundary, although it does not correspond with the established corners and monuments. *Ibid.*

CORPORATIONS.

1. Under the act concerning "towns," (R. S. 1845,) when the county court, under a state of facts which give it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be contested by a proceeding in *quo warranto*. *Kayser* v. *Bremen*, 88.
2. That act is not unconstitutional. The duties imposed on the county court are judicial and not legislative in their nature. *Ibid.*
3. Under the law of 1851, authorizing the formation of companies to construct plank roads, a stockholder, who assists in the organization of the company, will not be permitted to escape from his liability to pay for his stock, upon the ground that the company was not organized in strict conformity to the law. *Central Plank Road Co.* v. *Clemens*, 359.
4. Nor on the ground that no legal notice was given of the election of directors. *Ibid.*
5. It is no defence to a suit for an instalment upon stock in a plank road company, that there has been a departure from the route proposed in the articles of association. *Ibid.*

COSTS.

1. When a person, who has entered into a recognizance to keep the peace and to appear before the criminal court, shall there be discharged, by reason of the failure of the prosecutor to appear, it is error for the court to adjudge the costs against the defendant. They should be adjudged against the prosecutor. *State* v. *Fawcett*, 380.

COUNTY.

1. Under the act of 1851, concerning the St. Louis law commissioner's court, the county is not required to furnish a room for the transaction of the business of that court. *Watson* v. *St. Louis County*, 91.

COUNTY COURTS.

See ADMINISTRATION.

1. County courts have no jurisdiction to try titles to land. *Shields* v. *Ashley's Administrator*, 471.

COURTS.

1. The legislature has power to change the terms of courts and the return day of suits and process. *Carson* v. *Walker*, 68.

CRIMES AND PUNISHMENTS.

See INDICTMENTS.

1. On a charge of assault with intent to kill, an instruction, which so defines the crime as to exclude all consideration whether the assault was committed under circumstances of provocation, or in self defence, is erroneous. *State* v. *Williamson*, 394.

CUSTOM.

1. By the custom of Paris or French law, real estate owned by either party at the time of marriage, did not enter into the community. *Childress & Mullanphy* v. *Cutter*, 24.
2. A marriage contract, purporting to create a community according to the custom of Paris, must be construed with reference to that custom. *Ibid.*

DAMAGES.

1. Where a sale of leasehold under a deed of trust was enjoined, and pending the injunction, the buildings burned down and the lease was declared forfeited, so that the trust property would not have sold for enough to defray the expenses of a sale; *it was held* that, upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes with interest, even though the makers were solvent. *Kennedy* v. *Hammond & Hall*, 341.
2. A. brought an action of trespass against B. for the value of a negro woman slave taken and converted by B. to his own use, and recovered a judgment, which was satisfied. During the pendency of the suit, the slave was delivered of a child. A. afterwards brings another suit for the value of the child. *Held*, A. cannot recover, as the interest which accrued during the pendency of the first suit, by the birth of the child, was merely an incident to the principal object of the suit, and might have been taken into consideration by the jury in assessing the damages in that suit. *Garth* v. *Everett*, 490.
3. A set-off is not admissible where the claim on either side is for unliquidated damages. *Johnson* v. *Jones*, 494.
4. A. sets fire to the stubble on his inclosure, and, without any negligence or default on his part, and by inevitable accident, it escapes and crosses over the open prairie to the inclosure of B. and burns his fence. *Held*, A. is not liable to an action for the damage.

Query, If the stubble is fired on Sunday? *Miller* v. *Martin*, 508.

DEEDS.

See CONVEYANCES.

DEMAND.

See ASSUMPSIT, 1.

DEPOSITIONS.

1. The deposition of a witness has been taken in a suit and remains on file unsuppressed. *Held*, on the trial of the suit, the party cannot read in evidence a deposition of the same witness, taken in a former suit between the same parties, unless he has filed it in the suit in which he proposes to read it, or has given the opposite party notice that he intends to use it. *Samuel* v. *Withers*, 532.

DESCENTS AND DISTRIBUTIONS.

1. By the Spanish law, which formerly prevailed in this state, if a husband or wife married a second time, the property which he or she acquired from a former spouse, either directly or by inheritance from any of the children of the first marriage, became the property of the surviving children of the first marriage, and the spouse who married again only had the usufruct of it during life. *Childress & Mullanphy* v. *Cutter*, 24.
2. There was an exception to this general rule, in favor of women becoming widows before the age of twenty-five years. But a widow, who claims the benefit of this exception, must prove herself within it; otherwise, the case will be determined according to the general rule. *Ibid.*
3. Under the twelfth section of the territorial act of July 4th, 1807, upon the death of a person who had acquired an estate of one of his parents, the estate descended exclusively to his blood, on the part of the parent from whom it came to him. *Ibid.*

DETINUE.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

DEVISE.

1. Under the statutes of this state, up to 1826, land which the testator had devised in trust for an infant child might be levied on and sold, under an execution against the estate of the testator. *Carson* v. *Walker*, 68.

DOWER.

1. Under our statute, a widow is entitled to dower in no other personalty than that which belonged to the husband at the time of his death. *McLaughlin* v. *McLaughlin*, 242.
2. Under the act of congress of March 3d, 1843, a widow is not entitled to dower in land to which her husband had a mere right of pre-emption, which had not been consummated at the time of his death. *Wells' Guardian* v. *Moore*, 478.

EJECTMENT.

1. The plaintiff in an ejectment offered in evidence, in support of his title, a transcript filed in the circuit court of a judgment rendered before a justice of the peace. He then offered an execution issued from the circuit court, which, on its face, purported to be on a *judgment of the circuit court*, and a sheriff's deed, under this execution, and reciting it. *Held*, the execution and sheriff's deed were properly excluded. *Blain* v. *Coppedge*, 495.

EQUITY.

See CHANCERY.

ESTOPPEL.

1. A party is not estopped from claiming as his own personal property which he has "delivered to another and permitted him to retain possession of and use and control as his own." To amount to an estoppel, there must be something more specific. *McDermott* v. *Barnum & Moreland*, 114.
2. The acceptance of a deed is not such a recognition of the title of the vendor, as to estop the vendee from availing himself of a possession adverse to that title, under the statute of limitations. *Blair* v. *Smith*, 273.
3. Where the owners of contiguous lots mutually establish a boundary line and build up to it, and use and occupy according to it, for a period long enough to show their agreement and acquiescence, although less than the period which would be a bar under the statute of limitations, they, and those claiming under them, will be estopped from afterwards claiming a different boundary. *Taylor & Mason* v. *Zepp*, 14 Mo. Rep., affirmed. *Ibid.*

ESTOPPEL—*(Continued.)*

4. This principle is not in contravention of the statute of frauds. *Ibid.*
5. A. brought an action against B., to recover the proceeds of land sold as A.'s, on execution in favor of B., under a judgment, which, as A. claimed, B. had previously agreed to enter satisfied. *Held*, A. cannot maintain such an action, when he disclaims any title to the land sold, and admits on the trial that he has none. *Barada* v. *Carondelet*, 323.
6. A stockholder in a plank road company who assists in the organization will not be permitted to escape from his liability to pay for his stock, on the ground that the company was not organized in strict conformity to the law. *Central Plank Road Co.* v. *Clemens*, 359.
7. A., claiming an equitable title to land, files a bill in chancery against B., who holds the legal title. *Held*, B. may set up in defence a prior equity in C., and is not estopped from so doing, by a written agreement of compromise between him and C., in which it is recited that "B. is satisfied he has an indefeasible title to the land and C. acknowledges he has no just claim to it." *Livermore* v. *Leonard*, 474.

EVIDENCE.

1. A certified copy of any record or public paper, by the officer intrusted with its custody, is evidence, if the original would be; but such documents are not evidence of matters stated in them, which do not belong to the transaction which the officer was required to record. *Childress & Mullanphy* v. *Cutter*, 24.
2. Church registers are not admissible in evidence, except by special statute, unless they are, by the civil law of the country or state where kept, recognized as documents of an authentic and public nature. *Ibid.*
3. Recitals in such registers are not admissible as evidence of pedigree. *Ibid.*
4. Under the act of congress of May 26, 1790, in a suit upon a judgment of another state, whose laws, as to the effect of judgments, correspond with our own, when it appears from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear is not admissible. *Warren & Dalton* v. *Lusk*, 102.
5. In a suit by A. against B., for the price of a cow sold by B. to A., the record in a suit between A. and C. who claimed to own the cow, in which there was a judgment in C.'s favor, is not competent evidence to show title in C., nor for any other purpose, unless B. had notice of the suit. *Fallon* v. *Murray*, 168.
6. The person of whom B. bought the cow, is a competent witness for him, in such a suit. *Ibid.*
7. See PLEADING, 4, 5.
8. A trustee is a competent witness for the *cestui que trust*, in respect to the trust property. If, however, he were incompetent, the dismissal of the suit as to him, after his testimony had been taken, would not restore his competency. *McLaughlin* v. *McLaughlin*, 242.
9. The admissions of the grantor in a deed of trust after its execution, although not admissible *against* the *cestui que trust*, are in his favor. *Ibid.*
10. An administrator, in a suit against him, may show that funds have come into the hands of the plaintiff, as administrator of the deceased in another state, in reduction of the amount sought to be recovered. *Ibid.*
11. The plaintiff, in his declaration, averred that he had deposited a certain sum of money with B., as a banker, and that the defendant, C., in consideration that B. would take him as a partner, had promised to pay the sum so deposited. The evidence was, that the plaintiff had deposited the money with B. and D., as partners, and that D. went out, and shortly after C. came into the firm. *Held*, this was no material variance. *Hoyt* v. *Reed*, 294.

EVIDENCE—*(Continued.)*

12. In such a case, when the plaintiff produced his bank book, which showed his account, commencing before the defendant came in as a partner, and running down after he came in, with balances struck after that time; and when it was shown that this account was but a transcript of the ledger of the concern, the court could not, with propriety, say there was no evidence, that the defendant had assented to the transfer of the liabilities of the old to the new firm. *Ibid.*
13. A party who has been jointly indicted with the defendant, but in whose case a *nolle prosequi* has been entered, is a competent witness against him. *State* v. *Clump*, 385.
14. The supreme court will not reverse either a criminal or civil case, for the refusal of the court below to instruct the jury that evidence of verbal confessions is to be received with great caution. *Ibid.*
15. A. was indicted for an assault upon B. with intent to kill. A. had previously written an obscene letter about his own wife, the mother-in-law of B., out of which the affray originated, in which A. was first attacked. *Held*, this letter was inadmissible as evidence against A. *State* v. *Williamson*, 394.
16. A widow is a competent witness for the interest of her deceased husband's estate. *Scroggin & Smith* v. *Holland*, 419.
17. To authenticate a record of a court of another state, under the act of congress of May 26, 1790, the certificate of the judge must state that the attestation of the clerk is in due form. *Wilburn's Administrator* v. *Hall*, 428.
18. In an action against a person for failing to attend as a witness, when duly summoned, a transcript of the subpœna served on him and of the record of a part of the proceedings in the case, is admissible evidence, although the full record is not offered. *Connett* v. *Hamilton*, 442.
19. By the terms of a contract sued on, the defendants were to deliver plaintiff broom corn, cleaned and baled, ready for shipping, as fast as the same could be prepared by them; the plaintiff was to have the control and direction of the whole work. *Held*, evidence of defects in machinery furnished by plaintiff to defendants, which occasioned delay, is competent evidence for defendants, in an action for a breach of the contract. *Denny* v. *Kile*, 450.
20. The facts appearing in evidence, the understanding of a witness can have no influence in determining whether one or two persons are bound by a contract. *Elliott* v. *Sanderson*, 482.
21. The plaintiff in an ejectment offered in evidence, in support of his title, a transcript filed in the circuit court of a judgment rendered before a justice of the peace. He then offered an execution issued from the circuit court, which, on its face, purported to be on a *judgment of the circuit court*, and a sheriff's deed, under this execution, and reciting it. *Held*, the execution and sheriff's deed were properly excluded. *Blain* v. *Coppedge*, 495.
22. If there is any evidence, however slight, it is error for a court to tell a jury there is none. *Hays* v. *Bell & Williams*, 496.
23. It is error for a court to give instructions to a jury, which are supported by no evidence. *Ibid.*
24. When an account between parties is stated, with debit and credit sides, and the very matter about which the controversy arises is stated in the account, the presumption of law is, that the account is just, unless it be shown that there is some fraud, omission or mistake. *Carroll* v. *Paul*, 226.

EXECUTIONS.

1. Executions against the estates of deceased persons were legal in this state, until the

EXECUTIONS—*(Continued.)*

passage of the act approved December 30, 1826, which took effect from May 1, 1827. *Carson* v. *Walker*, 68.

2. Under the act of January 25, 1817, section 5, taken in connection with the act of January 12, 1822, section 28, where an execution against the estate of a deceased person was issued in less than eighteen months after the date of the letters testamentary, but the sale under it did not take place until more than eighteen months had elapsed, the sale is valid. *Ibid.*
3. An execution, issued within a period forbidden by law, on a judgment lawfully rendered in a court of general jurisdiction, is not void, but only voidable. *Ibid.*
4. Under the statutes of this state, up to 1826, land which the testator had devised in trust for an infant child, might be levied on and sold, under an execution against the estate of the testator. *Ibid.*
5. Under the fifth clause of the fourteenth section of the act concerning executions, (R. S. 1845,) where A. has agreed to convey land to B. and B. has agreed to pay for it, or has paid for it in whole or in part, B. has such an interest in the land as may be sold under execution. *Aliter*, If B. has paid no money and is under no obligation to pay. *Brant* v. *Robertson*, 130.
6. The interest of a mortgagor, or pledgor, of personal property in the hands of the mortgagee, or pledgee, is not subject to sale under execution. *Sexton* v. *Monks*, 156.
7. See SALE, 3.
8. Equitable interests, in personal estate, are not vendible under execution. *Boyce* v. *Smith*, 317.
9. See ESTOPPEL, 5.
10. A judgment confessed by one partner, in the name of himself and his co-partner, is void as to the co-partner, and an execution issued thereon is properly quashed on his application. *Morgan* v. *Richardson*, 409.
11. See EVIDENCE, 21.
12. See JUSTICES OF THE PEACE, 2.
13. A party cannot interplead to claim assets in the hands of a person summoned as garnishee *on execution*. *Wimer* v. *Pritchartt*, 252.

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION.

FAILURE OF CONSIDERATION.

See CONTRACTS, 4.

FOREIGN JUDGMENTS AND LAWS.

1. In the absence of the knowledge of what the law of a sister state is, on questions of common law, our courts presume that the law of such state corresponds with our own. *Warren & Dalton* v. *Lusk*, 102.
2. Under the act of congress of May 26th, 1790, in a suit upon a judgment of another state, whose laws, as to the effect of judgments, correspond with our own, when it appears from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear, is not admissible. *Ibid.*

FRAUDS AND PERJURIES.

1. The principle of estoppel *in pais*, as applied to the establishment of boundaries between contiguous land owners, is not in contravention of the statute of frauds. *Blair* v. *Smith*, 273.
2. Frauds and trusts are not within the statute of frauds. *Groves' Heirs* v. *Fulsome*, 543.

FRAUDS AND PERJURIES—*(Continued.)*

3. A party can maintain no action on a contract which he procures by fraud. *Denny* v. *Kile*, 450.

FRAUDULENT CONVEYANCES.

1. The delivery of a slave, on a bailment, by way of a loan, does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. (R. S. 1845, 527.) *McDermott* v. *Barnum & Moreland*, 114.
2. A. "delivers personal property to B. and permits him to retain possession of, and use and control it as his own." *Held*, These facts do not amount to fraud in law, but are only evidence of fraud, to be passed upon by a jury. *Ibid.*
3. When, under such circumstances, the property is sold under execution as B.'s, A. is not estopped from claiming it as his own. *Ibid.*
4. A sheriff's sale under execution may be shown to be conclusive or fraudulent, and that there was a secret reservation of a trust in favor of the defendant, with the consent of the purchaser. *Dallam* v. *Bowman*, 225.
5. A conveyance of an intestate cannot be impeached by his administrator or heirs, for fraud as to creditors. None but creditors themselves, and those in privity with them, can avoid it. *McLaughlin* v. *McLaughlin*, 242.
6. None but a creditor or purchaser can raise the objection that a deed conveying articles consumable in the using, the grantor retaining possession, is void. *Ibid.*
7. Where a debtor, in failing circumstances, assigns all his property for the benefit of certain preferred creditors, a clause in the deed of assignment, directing the surplus, if any, after paying the enumerated debts, to be paid the grantor, will not make the deed fraudulent as to the other creditors, where it is admitted that the whole property is insufficient to pay even the preferred debts. *Richards & Robinson* v. *Levin*, 594.

GAMING.

See GARNISHMENT, 2.

GARNISHMENT.

1. A party cannot interplead in a cause to claim assets in the hands of a person summoned as garnishee on execution. The garnishee must answer at his peril. *Wimer* v. *Pritchartt*, 252.
2. Where a stakeholder in a wager is summoned as garnishee of the winning party, and the wager was determined without any demand upon the garnishee by the losing party for the money deposited by him, and he makes no claim, judgment will be given against the garnishee for the whole sum in his hands. *Ibid.*
3. After an administrator, upon a settlement, has been adjudged to pay over a sum of money, he is subject to garnishment in a suit against the person in whose favor payment has been adjudged. *Richards* v. *Griggs*, 416.
4. To constitute a valid assignment of a debt not evidenced by bond, bill or note, as against the debtor, notice must be given to him; and if, after an assignment without notice to him, judgment is obtained against him, as garnishee, in a suit against his original creditor, he will be protected. *Ibid.*
5. A., the maker of a note payable to B., was summoned as garnishee in an attachment suit against B., before a justice of the peace. C. filed an interplea, claiming the debt evidenced by the note, by endorsement from B., before the date of the garnishment. Judgment went against him on the interplea, from which he took no appeal. Afterwards, he withdraws the note and brings suit on it against the maker. *Held*, the judgment on the interplea is a bar to the action. *Richardson* v. *Jones*, 177.

GROCERIES AND DRAM SHOPS.

See INDICTMENTS, 4.

1. Under the act concerning groceries and dram shops, a license to sell intoxicating liquors at one place is no defence to an indictment for selling them at a different place, although the two bars are in adjoining buildings and there is a communication between them. *State* v. *Fredericks*, 382.
2. Under the amendatory act of 1851, every fermented drink is an intoxicating drink, within the meaning of the act to regulate groceries and dram shops, approved March 25th, 1845. *State* v. *Lemp*, 389.
3. No person can sell intoxicating liquor without a license, even though it is of domestic manufacture. *Ibid.*

GUARDIAN AND WARD.

1. In an action by a child against the administrator of his deceased mother, for money received by her in the capacity of guardian, the administrator will not be allowed to set up a claim for the support and education of the child by the intestate, when there is no evidence that she ever intended to make a charge therefor. *Guion* v. *Guion's Administrator*, 48.

HUSBAND AND WIFE.

See PRE-EMPTION, 1, 3. DOWER.

1. By the custom of Paris, real estate owned by either party, at the time of marriage, did not enter into the community. *Childress & Mullanphy* v. *Cutter*, 24.
2. A marriage contract, purporting to create a community according to the custom of Paris, must be understood with reference to that custom. *Ibid.*
3. By the Spanish law, which formerly prevailed in this state, if a husband or wife married a second time, the property which he or she acquired from a former spouse, either directly or by inheritance from any of the children of the first marriage, became the property of the surving children of the first marriage, and the spouse who married again only had the usufruct of it during life. *Ibid.*
4. There was an exception to this general rule, in favor of women becoming widows before the age of twenty-five years. But a widow who claims the benefit of this exception, must prove herself within it; otherwise the case will be determined according to the general rule. *Ibid.*
5. A. conveyed to B. one half of certain capital stock "in trust for the sole benefit of the wife of C. and her children;" also, one half of the profits arising from the stock, "to be applied by B. *for the benefit* of C.'s wife and her children." *Held*, this language is sufficient to exclude C.'s marital right to the profits. *Clark* v. *Maguire*, 302.
6. No particular form of words is necessary to vest property in a married woman to her separate use, so as to exclude the married rights of her husband. Any words which indicate the intention will be sufficient. *Ibid.*
7. A. conveyed to B. real estate to be held in trust for A. until a certain sum was paid, and afterwards in trust for the separate use of the wife of C. At the same time, A. executed an agreement to complete improvements then in progress on the property, in a specified time and manner. *Held*, although C.'s wife assumed no personal obligation to pay the stipulated price, yet payment could be enforced against the property itself. *Soulard* v. *Lane*, 366.
8. A widow is a competent witness for the interest of her deceased husband's estate. *Scroggin & Smith* v. *Holland*, 419.

INCLOSURES.

1. To enable a person to justify under the act concerning "Inclosures," (R. S. 1845,) for killing his neighbor's stock, he must bring himself exactly within the protection of the statute. *Early* v. *Fleming*, 154.

INDICTMENT.

1. An indictment under section 43 of article 8 of the act of 1845, concerning "Crimes and Punishments," which substantially pursues the words of the statute, is sufficient. Matter of aggravation in a count will not vitiate it. *State* v. *Fleetwood*, 448.
2. A count which charges that the defendant ran a horse upon the highway, &c., "so as to interrupt travelers," instead of "so as to interrupt travelers thereon," is bad. *Ibid.*
3. Under the twenty-fourth section of article 3 of the act concerning "Crimes and Punishments," (R. S. 1845,) a person may be indicted in the same count for burglary and either grand or petit larceny. *State* v. *Smith*, 550.
4. A person was indicted for a violation of the first section of the act of 1845, concerning "Groceries and Dram Shops," in selling liquor without license. The indictment charged that he had sold one pint. The proof was that he had sold a half pint. *Held*, the proof was sufficient to sustain the indictment. *State* v. *Cooper*, 551.

INFANCY.

See PARENT AND CHILD.

INJUNCTIONS.

1. Where a petition prays, among other things, for an injunction, but that branch of the petition is not passed upon by the court below, nor brought in any way to its notice, the supreme court will not interfere, as this would be an exercise of original jurisdiction. *Barada* v. *Carondelet*, 323.
2. Where a sale of leasehold under a deed of trust was enjoined, and pending the injunction the buildings burned down and the lease was declared forfeited, so that the trust property would not have sold for enough to defray the expenses of a sale; *it was held*, that upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes, with interest, even though the makers of the notes were solvent. *Kennedy* v. *Hammond & Hall*, 341.

INSURANCE.

1. The risks enumerated in the printed part of an open policy of insurance may be restricted or enlarged by the written endorsement of the particular shipment lost. *Moore & Porter* v. *Perpetual Insurance Co.*, 98.
2. A memorandum, attached to the endorsement of a shipment of negroes, stated that they were only insured against the dangers incident to navigation, such as blowing up, drowning, &c. *Held*, this will cover a loss of a negro by drowning during the voyage, without any disaster happening to the boat, or any unusual occurrence causing him to fall overboard. *Ibid.*

INTEREST.

See MISTAKES, 1. MORTGAGES, 6.

INTERPLEADER (BILLS OF.)

See *Richards* v. *Griggs*, 416.

INTERPLEADER (IN ATTACHMENT.)

1. A party cannot interplead, under the provision in the attachment law, to claim assets in the hands of a person summoned as garnishee *on execution*. *Wimer* v. *Pritchartt*, 252.
2. A judgment against a party interpleading in an attachment suit to claim the debt evidenced by a note, the maker of which has been summoned as garnishee, is a bar to a future action on the note. *Richardson* v. *Jones*, 177.

INTERPLEADER (IN ATTACHMENT)—*Continued.*

3. When a party has filed one interplea in an attachment suit, and on the trial has taken a non-suit, it is no error for the court to strike out a second interplea filed by him in the same case, without leave of court. *Keiser's Administrator* v. *Moore & Chapman*, 179.

JOINDER.

1. The new code does not affect the rule against multifariousness. Suits against different persons for different causes of action cannot be joined. *McLaughlin* v. *McLaughlin*, 242.
2. Under the new code, a proceeding by *mandamus* cannot be joined with other actions. *Barada* v. *Carondelet*, 323.

JOINT TENANTS AND TENANTS IN COMMON.

1. One tenant in common may sue another under the new code of practice of 1849, without resorting to the action of account under the statute of 1845. *Rogers* v. *Penniston*, 432.
2. A. and B. own a ferry in common, with an agreement that each shall be entitled to one half of the proceeds, after paying all expenses. B., in good faith and for a valuable consideration, leases the ferry out to C. without the consent of A. *Held*, A. cannot recover of B. one half of the proceeds received by C., but only one half of the rent reserved by B. *Ibid.*

JUDGMENTS.

1. Under the act of congress of May 26, 1790, in a suit upon a judgment of another state, whose laws, as to the effect of judgments, correspond with our own, when it appears from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear is not admissible. *Warren & Dalton* v. *Lusk*, 102.
2. A. commenced a suit against a steamboat, under the boat and vessel act. B., the owner of the boat, as principal, and C. and D. as sureties, bonded the boat. Pending the suit, B. died. After judgment against the boat, on motion, a judgment was rendered against B.'s administrator on the bond. The administrator was not made a party to the proceeding, nor did it appear from the record that he had any notice of it. *Held*, the judgment against the administrator is not *void*, and however erroneous it may have been, no advantage can be taken of the error, except by a direct proceeding to reverse or set it aside. *Childs* v. *Shannon*, 331.
3. A judgment confessed by one partner, in the name of himself and his co-partner, is void as to the co-partner, and an execution issued thereon is properly quashed on his application. *Morgan* v. *Richardson*, 409.

See EVIDENCE, 21. INTERPLEADER, 2. JUSTICES OF THE PEACE, 2.

4. A judgment rendered in favor of a plaintiff, who had died before its rendition, is not *void*. *Coleman* v. *McAnulty*, 173.
5. Proceedings to set aside an irregular judgment will not affect any one who has acquired a title under it, unless he is made a party. *Ibid.*

JURISDICTION.

See ADMINISTRATION, 8, 9, 10. JUSTICES OF THE PEACE, 2.

1. County courts have no jurisdiction to try titles to land. *Shields* v. *Ashley's Administrator*, 471.
2. The supreme court has no original jurisdiction. *Knowles* v. *Mercer*, 455. *Barada* v. *Carondelet*, 323.

JUSTICES' COURTS.

See CONTRACTS, 4.

JUSTICES OF THE PEACE.

1. No formality is necessary in the statement of causes of action before justices of the peace. *Early* v. *Fleming*, 154.
2. A. commenced an action against B. before a justice of the peace, on an open account, amounting to more than ninety dollars. On the trial, B. secretly asked the justice if he had jurisdiction, to which the justice replied that he had, as A. did not claim more than ninety dollars. B. then went into the trial, on which A.'s attorney expressly stated that he did not claim more than ninety dollars, and judgment was rendered for less than that sum. *Held*, the judgment and execution issued thereon are not void. *Best* v. *Best*, 530.

LANDLORD AND TENANT.

1. When a person rents a tenement for one year, and after its expiration, remains in possession, the presumption is, that he has rented it for another year, and not that he is a trespasser. *Stoops* v. *Devlin*, 162.
2. In such a case, a tenant holding under him will not be permitted to dispute his title. *Ibid.*
3. It is no defence to an action for rent under an express covenant, that a rise in the river rendered a part of the leasehold premises untenantable. When the defendant files an offset for damages sustained by such a rise, it is properly stricken out, on motion. *Niedelct* v. *Wales*, 214.
4. The assignee of a lease by way of mortgage is not liable to the lessor for rent, unless he enters into possession. *McKee* v. *Angelrodt*, 283.

LANDS AND LAND TITLES.

See COMMUNITY, 1, 2. DESCENTS AND DISTRIBUTIONS, 1, 2, 3. PRE-EMPTION.

1. To establish that a lot was a common field lot within the meaning of the act of 1812, it is not necessary to show that the village authorities under the Spanish government exercised any authority over it or its owner. *Harrison* v. *Page*, 182.
2. A common field lot was one of a series of lots in the vicinity of the village, occupied and cultivated by the inhabitants of the village in a common field. *Ibid.*
3. That a lot was not embraced within a Spanish survey of the common fields, is slight, if any evidence, that it was not a common field lot. *Ibid.*
4. Where a deed, describing the land conveyed by reference to a Spanish concession, was executed at a time when such concession had been located and confirmed by the United States government, and there is no call in the concession inconsistent with such location, the deed will be held to pass the land on which the concession has thus been located. *Ibid.*
5. Although the state courts cannot interfere with the primary disposition of the soil by the general government, yet, if one obtains from the United States the legal title to a tract of land, and in so doing, is guilty of a fraud towards another, or affects himself with a trust, he shall hold the title thus acquired, for the benefit of those who have been injured by his conduct. *Groves' Heirs* v. *Fulsome*, 543.
6. During the pendency of a suit under the act of congress of May 26th, 1824, to try the validity of a claim to land, the land claimed was not reserved from entry and sale, unless the claimant had filed a notice of his claim with the recorder of land titles prior to July 1st, 1808. A person obtaining a patent for the land from the United States after the institution of the suit and before a final decree in favor of the claimant, will hold it against a patent issued upon the final decree. *McCabe* v. *Worthington*, 514.
7. The survey, designation and setting apart, for the support of schools, of a piece of property, described to be within the out-boundary of the town, as directed to be surveyed under the act of June 13th, 1812, taken together with the act of 1831,

LANDS AND LAND TITLES—*(Continued.)*

make a regular, formal title to the property so set apart. *Kissell* v. *Schools*, 553.

8. An entry of the same land with the register and receiver must yield, in an action of ejectment, to the title under such designation. *Ibid.*
9. If the purchaser, under such an entry, is allowed to question the legality of the act of setting the property apart for the support of schools, he must show it to be entirely without authority of law, and void, in order to have benefit from such impeachment of title. *Ibid.*
10. A designation, which describes the land set apart for schools, as "within the bounds of the survey directed to be made by the first section of the act of June 13, 1812," &c., and as "within the limits of the town of St. Louis, as it stood incorporated on the 13th June, 1812," &c., is not invalid on its face, although it does not state that the land thus set apart ever was, in whole or in part, a town lot, out-lot or common field lot, belonging to the town, or that it was set apart as such. *Ibid.*
11. The fact that the survey of the out-boundary of St. Louis, under the act of 1812, professes to be a survey of the *incorporated* town, with the out-lots, common field lots and commons, does not invalidate it, when it is manifest that the incorporated town, according to its own limits, must be within the out-boundary required to be run. *Ibid.*
12. The fact that the survey of the out-boundary includes too much or too little land, does not invalidate it, as to any property rightly included within it; and to impeach the survey, it must be shown that the land in dispute was not rightly included. *Ibid.*
13. The first section of the act of 1812 contemplates a continuous out-boundary of the towns, to be so run as certainly to include the out-lots, common field lots and commons of the towns. *Ibid.*
14. It was not necessary, in order that property included within the out-boundary should be reserved for the support of schools, that it should have been surveyed into town lots, out-lots or common field lots under the Spanish government. *Ibid.*
15. The act of 1812 was designed to dispose of all the property included within the out-boundaries of the towns. *Ibid.*
16. Vacant land contiguous to the town of St. Louis, bounded on all sides except one fronting on the river, by land surveyed into lots, might properly have been set apart as an out-lot, according to the practice of the government, though it had never itself been surveyed as a lot. *Ibid.*

LAW COMMISSIONER.

1. Under the act of 1851, concerning the St. Louis law commissioner's court, the county is not obliged to furnish a room for the transaction of the business of that court. *Watson* v. *St. Louis County*, 91.
2. Causes cannot be taken by writ of error or appeal from the law commissioner's court of St. Louis county, to the circuit court, but only to the supreme court. *Little* v. *Sellick*, 269.
3. The St. Louis law commissioner cannot affirm the judgment of a justice of the peace, for the non-payment of the fee given him by the act of February 17, 1851, upon the filing of the appeal papers. *Hunt* v. *Hernandez*, 170.

LEGISLATURE.

1. The legislature has power to change the terms of courts and the return days of suits and process. *Carson* v. *Walker*, 68.

LICENSE.

See GROCERIES AND DRAM SHOPS.

LIENS.

See MORTGAGES, 6.

LIMITATIONS.

See ESTOPPEL, 3.

1. Adverse possession for twenty years confers upon the possessor an absolute title against all persons not excepted by our statute of limitations. *Blair* v. *Smith*, 273.
2. The acceptance of a deed is not such a recognition of the title of the vendor, as to estop the vendee from availing himself of a possession adverse to that title, under the statute of limitations. *Ibid.*

MANDAMUS.

See NEW TRIALS, 3.

1. Under the new code of 1849, a proceeding by *mandamus* cannot be joined with other actions. *Barada* v. *Carondelet*, 323.

MARRIAGE CONTRACT.

1. A marriage contract, purporting to create a community according to the custom of Paris, contained this clause: "The said future spouses take each other, with their property and all the rights now actually belonging to them, and also those which may fall to or appertain to them, &c., which property shall wholly enter into the community," &c. *Held*, the words "which property," &c., must be understood as applicable only to that which came to them during marriage. *Childress & Mullanphy* v. *Cutter*, 24.

MECHANICS' LIENS.

1. The new code does not abolish the proceeding by *scire facias* to enforce mechanics' liens. *Doellner* v. *Rogers*, 340.

MISTAKE.

1. A mistake in the calculation of interest, in a settlement, will be relieved against by a court of equity. *Boon* v. *Miller's Executors*, 457.

MORTGAGE.

1. No conveyance can be a mortgage, unless it is made to secure the payment of a debt or the performance of a duty, either existing at the time the conveyance is made, or to be created or to arise in the future. *Brant* v. *Robertson*, 129.
2. To determine whether a transaction was a conditional sale or a mortgage, courts will look, not only to the deeds and writings, but to all the circumstances of the contract, to ascertain the real intention of the parties. If the intention is doubtful, it will be held a mortgage, as this construction is more just and equitable. *Ibid.*
3. The interest of the mortgagor of personal property in the hands of the mortgagee, is not subject to sale under execution. *Sexton* v. *Monks*, 156.
4. The assignee of a lease by way of mortgage is not liable for rent, unless he enters into possession. *McKee* v. *Angelrodt*, 283.
5. A deed of trust was given to secure two notes. There was no clause in the deed providing that if one of the notes became due and remained unpaid, the other should also become payable. At the maturity of the first note, the property was sold, and the purchaser tendered to the trustee the amount of that note, and produced the receipt of the assignees of the grantor for the balance of his bid. *Held*, the purchaser had no right to a deed until he tendered the amount of both notes, rebating for interest on the note not actually due. *Kennedy* v. *Hammond & Hall*, 341.
6. A. gave B. a bond bearing six per cent. interest, secured by deed of trust on a slave. Afterwards, without intending to abandon his lien on the slave, B.

MORTGAGE—*(Continued.)*

takes from A. a new bond, bearing ten per cent. interest, and gives up the old bond. *Held*, B., by this act, does not lose his lien on the slave. But in such case, the slave is only subject to a lien for the amount of the old bond, with six per cent. interest. *McDonald* v. *Hulse*, 503.

NEW CODE.

See PRACTICE. MECHANICS' LIENS. PLEADING.

NEW TRIAL.

1. Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a remittitur for the excess to avoid a new trial. *Hoyt* v. *Reed*, 294.
2. The statute directing that a second new trial shall not be granted to the same party, except when the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior, proceeds upon the supposition that the law has been correctly expounded to the jury, and is only applicable to such cases. *Boyce* v. *Smith*, 317.
3. When a second new trial has been improperly granted, that matter can only be corrected by a *mandamus* from the supreme court. *Ib.*
4. When a new trial has been refused, the supreme court, on appeal or writ of error, will look into the record, and if it finds that incorrect law was given to the jury, will reverse the judgment and award a new trial, without regard to the number of new trials previously granted to the party. *Ibid.*
5. The supreme court will not control the discretion of inferior courts, in granting new trials in criminal cases, unless in cases strong and unequivocal. *State* v. *Cruise*, 391.

NOTICE.

See ASSIGNMENT, 2.

OFF-SET.

See SET-OFF.

PARENT AND CHILD.

1. In an action by a child against the administrator of his deceased mother, for money received by her in the capacity of guardian, the administrator will not be allowed to set up a claim for the support and education of the child by the intestate, when there is no evidence that she ever intended to make a charge therefor. *Guion* v. *Guion's Administrator*, 48.

PARTNERSHIP.

1. A judgment confessed by one partner, in the name of himself and his co-partner, is void as to the co-partner, and an execution issued thereon is properly quashed on his application. *Morgan* v. *Richardson*, 409.

See JOINT TENANTS AND TENANTS IN COMMON, 2.

PATENT.

See LANDS AND LAND TITLES. PRE-EMPTION, 2.

PENAL BONDS.

See BONDS AND NOTES.

PLEADING.

See PRACTICE, 1, 2, 10, 11.

1. In a pleading under the new code, it is not necessary to state the facts or circumstances by which the ultimate fact relied on is to be proved. *See* v. *Cox*, 166.
2. Under the new practice, courts of original jurisdiction should be liberal in allowing amendments to pleadings in furtherance of justice. *Dallam* v. *Bowman*, 225.

PLEADING—*(Continued.)*

3. It is not necessary to declare upon an agreement not under seal, but it is admissible in evidence, in support of the common counts in an action of assumpsit. *Carroll* v. *Paul*, 226.
4. Although there is a variance between the declaration or bill of particulars, and the evidence offered in support of it, yet, where there have been previous trials of the cause, so that the introduction of the testimony is no surprise, the objection of variance is untenable. *Ibid.*
5. A petition, under the new code, which states that the defendant "made his note, and thereby promised to pay," &c., is sufficient, although the note, on its face, appears to have been executed by the defendant, as attorney for other parties. Under this allegation, the plaintiff may prove such facts as make the defendant personally liable. *McMartin* v. *Adams*, 268.
6. An allegation in a bill in equity, not denied in the answer, is not admitted, but must be proved. *Ingram & Hathaway* v. *Tompkins*, 399.

POLICY.

See INSURANCE.

PRACTICE.

See SUPREME COURT. LAW COMMISSIONER, 3. PLEADING. EVIDENCE, 12. NEW TRIALS, 2, 3, 4.

1. The thirteenth section of the seventh article of the new code, requiring either party relying upon a record, deed, or other writing, to file the original, or a copy, with his plea, is only applicable to cases in which the party recites his title in his pleading, as existing by written conveyances; or to a case in which the record, or writing, is recited in the pleading, as confirming or barring a right. *Sexton* v. *Monks*, 156.
2. Under the new code, a motion to strike out an answer which does not set up any legal defence to the action, is proper. *Niedelet* v. *Wales*, 214.
3. It is erroneous to take judgment by default against a defendant where there has been a judgment of non-suit against the plaintiff, which the record does not show to have been ever set aside. *Kelly* v. *Hogan*, 215.
4. Instructions, which are mere comments upon evidence, are properly refused. *Carroll* v. *Paul*, 226.
5. Under the new code, the St. Louis court of common pleas has equity jurisdiction. *McLaughlin* v. *McLaughlin*, 242.
6. Under the code, a person, claiming an interest in a suit adverse to the plaintiff, cannot become a party defendant without the permission of the court. In a suit in equity against a trustee, to get the legal title to property which had been conveyed to him by a deceased person, in trust for plaintiff, after the administrator has already made himself a party defendant, it is no error for the court to refuse permission to the widow, heirs and distributees of the deceased to become parties, as the administrator is competent to make all defence to the action. *Ibid.*
7. A *cestui que trust* files a bill in chancery against the trustee to get the legal title to the trust property. The administrator of the deceased grantor, in the deed of trust, on his application, is made a party defendant. During the trial, the plaintiff dismisses the suit, as to the trustee. *Held*, no judgment can be rendered against the administrator on a demand against the estate growing out of the trust property. *Ibid.*
8. The code does not affect the rule against multifariousness. A suit against the trustee for the legal title to the trust property, and against the administrator, on a demand growing out of the property, cannot be joined. *Ibid.*

PRACTICE—*(Continued.)*

9. Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a remittitur for the excess, to avoid a new trial. *Hoyt* v. *Reed*, 294.
10. Under the new code, a proceeding by mandamus cannot be joined with other actions. *Barada* v. *Carondelet*, 323.
11. In a proceeding under the new code to recover personal property, the value of the property need not be stated in the petition, if it is stated in the affidavit; nor is the omission of the jury to find the value a fatal error. *Schaffer* v. *Faldwesch*, 337.
12. The new code does not abolish the proceeding by *scire facias* to enforce mechanics' liens. *Doellner* v. *Rogers*, 340.
13. One tenant in common may sue another under the new code of practice, without resorting to the action of account under the statute of 1845. *Rogers* v. *Pennis-ton*, 432.
14. If there is any evidence, however slight, it is error for a court to tell a jury there is none. *Hays* v. *Bell & Williams*, 496.
15. It is error for a court to give instructions to a jury which are supported by no evidence. *Ibid.*
16. When a party has filed one interplea in an attachment suit, and on the trial has taken a non-suit, it is no error for the court to strike out a second interplea filed by him in the same case, without leave of court. *Keiser's Administrator* v. *Moore & Chapman*, 179.
17. If a bill in chancery contains no equity, it should be demurred to; if it is allowed to stand, evidence should be admitted to sustain it. *Groves' Heirs* v. *Fulsome*, 543.
18. A circuit court has no right to dismiss an appeal from a justice on account of the smallness of the amount in controversy. *Harris* v. *Hughes*, 599.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See SUPREME COURT, 6, 7. COSTS, 1.

PRE-EMPTION.

1. Under the act of congress of March 3d, 1843, a widow is not entitled to dower in land to which her husband had a mere right of pre-emption, which had not been consummated at the time of his death. *Wells' Guardian* v. *Moore*, 480.
7. A. entered a tract of land and, finding the wife of B. in possession without any claim of pre-emption, paid her for yielding up possession to him. Subsequently, she obtained a patent for the land from the government, under color of a right of pre-emption. *Held*, she holds the title thus acquired, as a trustee for the benefit of A. *Groves' Heirs* v. *Fulsome*, 543.
8. A married woman, whose husband is alive and has sold the improvements to another, under whom she is in possession, has no right of pre-emption, under the act of congress of May 29th, 1830, or any of the acts supplementary thereto. *Ibid.*

PRESCRIPTION.

See LIMITATIONS.

PRESUMPTIONS.

See ACCOUNT, 1. LANDLORD AND TENANT, 1. FOREIGN JUDGMENTS AND LAWS, 1.

PRINCIPAL AND AGENT.

See PLEADING, 5.

PROCESS.

1. The legislature has power to alter the return day of process. *Carson* v. *Walker*, 68.

QUO WARRANTO.

1. Under the act concerning "towns," (R. S. 1845,) when the county court, under a state of facts which gave it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be contested by a proceeding in *quo warranto*. *Kayser* v. *Bremen*, 88.

RECORDS.

See FOREIGN JUDGMENTS AND LAWS, 2. EVIDENCE, 5.

1. To authenticate a record of a court of another state, under the act of congress of May 26, 1790, the certificate of the judge must state that *the attestation of the clerk is in due form*. *Wilburn's Administrator* v. *Hall*, 428.

RELEASE.

1. A., as security of B., signs a note payable to C. Usury, which B. has contracted to pay C. is included in the amount on the face of the note. *Held*, the omission to disclose this fact to A. will not operate to discharge him. *Samuel* v. *Withers*, 532.

REMITTITUR.

See PRACTICE, 12.

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SALES.

See SET-OFF, 1.

1. Under the act of January 25, 1817, where an execution against the estate of a deceased person was issued in less than eighteen months after the date of the letters testamentary, but the sale of the lands under it did not take place until more than eighteen months had elapsed, the sale is valid. *Carson* v. *Walker*, 68.
2. To determine whether a transaction was a conditional sale or a mortgage, courts will look, not only to the deeds and writings, but to all the circumstances of the contract, to ascertain the real intention of the parties. If the intention is doubtful, it will be held a mortgage, as this construction is more just and equitable. *Brant* v. *Robertson*, 129.
3. A sheriff's sale under execution may be shown to be collusive or fraudulent, and that there was a secret reservation of a trust in favor of the defendant, with the consent of the purchaser. *Dallam* v. *Bowman*, 225.
4. A sold B. certain slaves, warranting his title to be good. *Held*, as long as B. remains in undisturbed possession of the slaves, he cannot set up, as defence to a note given for the purchase money, that, at the time of the sale, the title was not in A. In such a case, there is no failure of consideration, within the meaning of the fourteenth section of article five of the act concerning "Justices' Courts," (R. S. 1845.) *Morrison* v. *Edgar*, 411.

SCHOOL LAND (reserved by the act of 1812.)

See LANDS AND LAND TITLES, from 7 to 16 inclusive.

SCIRE FACIAS.

1. The new code does not abolish the proceeding by *scire facias* to enforce mechanics' liens. *Doellner* v. *Rogers*, 340.

SET-OFF.

1. A. sold B. a horse and received in exchange a yoke of oxen, and was to receive ten dollars besides. A. warranted the horse to be sound and agreed to take him back if he proved unsound. The horse proving unsound, B. offered to return him and demanded back his oxen. *Held*, in an action by A. against B. for the ten dol-

SET-OFF—*(Continued.)*

lars, B. may set-off and recover the value of the oxen. *Smith* v. *Steinkamper*, 150.

2. When a defendant, who is sued for rent under an express covenant, files an off-set for damages sustained by a rise in the river, which rendered a part of the leasehold premises untenantable, it is properly stricken out on motion. *Niedelet* v. *Wales*, 214.
3. A set-off is not admissible where the claim on either side is for unliquidated damages. *Johnson* v. *Jones*, 494.

SHERIFFS' DEED.

See EJECTMENT, 1.

SHERIFFS' SALES.

See SALES, 3.

SLAVES.

1. The delivery of a slave, on a bailment by way of loan, does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. *McDermott* v. *Barnum & Moreland*, 114.

See TRESPASS, 2. MORTGAGES, 6.

SPANISH LAW.

See *Childress & Mullanphy* v. *Cutter*, 24.

SUPREME COURT.

See INJUNCTIONS. NEW TRIALS, 3, 4.

1. Under the new code, where a case has been tried by the court below without a jury, and the finding of facts is incomplete on its face, the case will be reversed. *Brant* v. *Robertson*, 129.
2. The supreme court is averse to interfering with the exercise of discretion by inferior courts, in the matter of permitting amendments to pleadings. *Dallam* v. *Bowman*, 225.
3. Under the new code, when a case has been tried by the court below, without a jury, and there is no finding of facts preserved in the record, the judgment will be affirmed. *Rucker* v. *Musick*, 316.
4. Although the supreme court will not interfere with the verdicts of juries on the ground that they are against the weight of evidence, yet when hard cases appear to arise under the operation of this rule, it must be satisfied that the instructions are entirely unexceptionable. *Carroll* v. *Paul*, 226.
5. The supreme court will presume that the court below decided correctly, unless the record shows the contrary. *State* v. *Felps*, 384.
6. The supreme court will not reverse either a criminal or civil case, for the refusal of the court below to instruct the jury that evidence of verbal confessions is to be received with great caution. *State* v. *Clump*, 385.
7. The supreme court will not disturb the finding of facts by a jury in a criminal case, unless manifest injustice and wrong have been done; nor will it control the discretion of the court below, in granting new trials, unless in cases strong and unequivocal. *State* v. *Cruise*, 391.
8. The supreme court cannot exercise original jurisdiction by ordering a chancery case, on appeal, to be referred to a commissioner. Where the court is not satisfied from the evidence in the bill of exceptions that the decree of the court below was correct, and no account was taken, so that it is impossible to state what errors were committed, the case will be reversed and remanded, with directions to the court below to have an account stated between the parties. *Knowles* v. *Mercer*, 455.

SUPREME COURT—*(Continued.)*

9. When a case is tried by the court below, sitting as a jury, and no exception is taken, the supreme court will not review its finding of the facts. *Leith* v. *Steamboat Pride of the West*, 181.

SURETY.

1. In a suit against the securities on a note given for the price of a slave, a breach of the warranty of soundness may be set up by them in defence, though the warranty was to the principal alone, who is not joined. *Scroggin & Smith* v. *Holland*, 419.
2. A., as security of B., signs a note payable to C. Usury which B. has contracted to pay C. is included in the amount on the face of the note. *Held*, the omission to disclose this fact to A. will not operate to discharge him. *Samuel* v. *Withers*, 532.

SURVEYS.

See CONVEYANCES, 1. LANDS AND LAND TITLES.

TOWNS.

1. Under the act concerning "towns," (R. S. 1845,) when the county court, under a state of facts which gave it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be contested by a proceeding in *quo warranto*. *Kayser* v. *Bremen*, 88.
2. That act is constitutional. The duties imposed on the county court are judicial and not legislative in their nature. *Ibid.*

TRESPASS.

1. To enable a person to justify, under the act concerning "Inclosures," (R. S. 1845,) for killing his neighbor's stock, he must bring himself exactly within the protection of the statute. *Early* v. *Fleming*, 154.

See LANDLORD AND TENANT, 1.

2. A. brought an action of trespass against B. for the value of a negro woman slave taken and converted by B. to his own use, and recovered a judgment, which was satisfied. During the pendency of the suit, the slave was delivered of a child. A. afterwards brings another suit for the value of the child. *Held*, A. cannot recover, as the interest which accrued during the pendency of the first suit, by the birth of the child, was merely an incident to the principal object of the suit, and might have been taken into consideration by the jury in assessing the damages in that suit. *Garth* v. *Everett*, 490.
3. A. sets fire to the stubble on his inclosure, and, without any negligence or default on his part, and by inevitable accident, it escapes and crosses over the open prairie to the inclosure of B. and burns his fence. *Held*, A. is not liable to an action for the damage.

   Query, If the stubble is fired on Sunday? *Miller* v. *Martin*, 508.

TRUSTS AND TRUSTEES.

1. A trustee has no power, by a deed substituting another trustee, to change the nature of the trust, or the use of the trust fund. *Clark* v. *Maguire*, 302.
2. A. entered a tract of land, and finding the wife of B. in possession without any claim of pre-emption, paid her for yielding up possession to him. Subsequently, she obtained a patent for the land from the government, under color of a right of pre-emption. *Held*, she holds the title thus acquired as a trustee for the benefit of A. *Groves' Heirs* v. *Fulsome*, 543.
3. Frauds and trusts are not within the statute of frauds. *Ibid.*

USURY.

See RELEASE, 1.

VARIANCE.

See PLEADING, 5. EVIDENCE, 11.

VERDICTS.

1. Although the supreme court will not interfere with the verdicts of juries, on the ground that they are against the weight of evidence, yet, when hard cases appear to arise under the operation of this rule, it must be satisfied that the instructions are entirely unexceptionable. *Carroll* v. *Paul*, 226.
2. Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a *remittitur* for the excess, to avoid a new trial. *Hoyt* v. *Reed*, 294.

WAGERS.

See GARNISHMENT,

WARRANTY.

1. A. sold B. a horse and received in exchange a yoke of oxen, and was to receive ten dollars besides. A. warranted the horse to be sound and agreed to take him back if he proved unsound. The horse proving unsound, B. offered to return him and demanded back his oxen. *Held*, in an action by A. against B. for the ten dollars, B. may set-off and recover the value of the oxen. *Smith* v. *Steinkamper*, 150.
2. A. sold B. certain slaves, warranting his title to be good. *Held*, as long as B. remains in undisturbed possession of the slaves, he cannot set up, as a defence to a note given for the purchase money, that, at the time of the sale, the title was not in A. In such a case, there is no failure of consideration, within the meaning of the fourteenth section of article five of the act concerning "Justices' Courts," (R. S. 1845.) *Morrison* v. *Edgar*, 411.
3. In a suit against the securities on a note given for the price of a slave, a breach of the warranty of soundness may be set up by them in defence, though the warranty was to the principal alone, who is not joined. *Scroggin & Smith* v. *Holland*, 419.

WILLS.

1. Particular words in a will, if possible, will be so construed as to harmonize with the general intent of the testator, as collected from the whole will. *Peters* v. *Carr*, 54.

WITNESSES.

1. An action under the seventh section of the act concerning witnesses, (R. S. 1845,) against a person for failing to attend as a witness, when duly summoned, &c., may be begun before the determination of the suit. *Connett* v. *Hamilton*, 442.
2. In such a case, a transcript of the subpœna served on the party, and of the record of a part of the proceedings in the case, is admissible evidence, although the full record is not offered. *Ibid.*

WRIT OF ERROR.

1. A writ of error does not lie from the St. Louis law commissioner's court to the circuit court. *Little* v. *Sellick*, 269.

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